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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1201

ENGINEERS CLUB OF PHILADELPHIA, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 14–26) is reported in 42 F. Supp. 182.

JURISDICTION

The judgment of the Court of Claims was entered November 3, 1941. (R. 5.) A motion for a new trial was filed on January 2, 1942. (R. 5.) On February 2, 1942, the court ordered that petitioner's motion be allowed, amended findings filed with the former judgment and opinions to stand. (R. 5.) The petition for a writ of certiorari was filed May 1, 1942. (R. 27.) The jurisdiction of

this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Is a final decision of a United States District Court holding that a club is not a social club during a certain taxable period *res judicata* as to whether the club is a social club in a later period in a suit brought in the Court of Claims?

2. If such a decision is not *res judicata,* the question is whether, under the Acts of Congress which impose a tax on the dues and initiation fees of social, athletic, or sporting clubs or organizations, the club here involved was a social club during the taxable period and hence subject to the tax?

STATUTE AND REGULATIONS INVOLVED

The applicable portions of the statute and regulations involved are set forth in the Appendix (*infra,* pp. 9–12).

STATEMENT

The special findings of fact of the Court of Claims (R. 6–14) may be summarized as follows:

Petitioner is a corporation organized under the laws of Pennsylvania, and located at 1317 Spruce Street, Philadelphia. It was incorporated in 1892 for the following purposes (R. 6):

> * * * to promote the Arts and Sciences connected with Engineering, by means of

> periodical meetings for the reading and discussion of professional papers, and the circulation by publication among its members and others of the information thus obtained, and for social intercourse.

The petitioners by-laws provided that the membership should be composed of professional engineers or others with engineering or similar experience. Cards were issued on request of a member to the women of his household, which gave the holders the privileges of the ladies' reception room and dining room. (R. 6–7.)

Petitioner had a number of affiliated organizations, all of which were technical organizations which held meetings at the clubhouse. (R. 7.)

About once a month for seven or eight months during the year get-together dinners were held at the club at which there might be speaking or other forms of entertainment followed by a general social gathering, sometimes including dancing. Luncheon and dinner were served daily. The luncheons were largely attended, the attendance averaging from 100 to 125 persons. The attendance at dinner was small, except on special occations. (R. 8.)

The club building was owned by petitioner and was a four-story brick building with a frontage of 50 feet and a depth of 163 feet. The first two floors and part of the third floor were taken up with dining rooms, reception rooms, the auditorium, a library, and other rooms for meetings.

There were seven sleeping rooms on the third floor and nine on the fourth floor. In the basement were washrooms, a pool table and four card tables, and a bar. Magazines and newspapers were available in the lounge and there was a cigar stand in the lobby. (R. 8–9.)

The club employed an average of 30 people as clerical and domestic workers. (R. 9.)

During the period from July, 1935 to January, 1938, petitioner paid as taxes on dues and initiation fees of its members a total of $6,261.43. (R. 9–10.) On March 17, 1938, petitioner filed a claim for refund for the taxes so paid upon the ground that the District Court for the Eastern District of Pennsylvania had held that the club was not subject to the dues tax. (R. 11.) Before acting upon this claim for refund, the Commissioner demanded the submission of powers of attorney by the members of the club authorizing the club to act as their agent in the collection of the taxes. Upon the failure of the petitioner to furnish these powers of attorney, the Commissioner rejected the claim on the ground that such powers of attorney had not been furnished. On the same day, suit for the recovery of such taxes was filed in the Court of Claims. The Commissioner later wrote to the petitioner stating that it was held that the club was a social club or organization. (R. 11–12.)

On May 14, 1936, two suits had been filed by petitioner in the United States District Court for the

Eastern District of Pennsylvania, one against W. J. Rothensies, Collector of Internal Revenue, and the other against the defendant, United States of America. Both suits were for refund of taxes for periods prior to the taxable periods involved in this suit, and both were based upon the ground that the petitioner was not a social club. Both cases were defended upon the sole ground that petitioner was a social club and judgment was entered for petitioner in each. The opinion of the District Judge shows that upon the issue of whether petitioner was a social club the court found *inter alia* that the predominant purpose of the organization was not a social one and that the social features were subordinate and merely incidental to the active furtherance of the predominant purpose. Appeals from these judgments were perfected but subsequently a settlement was entered into and the appeals were dismissed. (R. 12–14.)

The club's charter, purposes and activities were of substantially the same nature and extent during the period in question as they were during the period involved in the District Court suits.

The Court of Claims made the following ultimate finding of fact (R. 14):

> Social activities constituted a material purpose of plaintiff club, and an important and substantial part of its activities during the period here in question.

ARGUMENT

1. It is well settled under the decisions of the Court of Claims and other courts that even though the predominant purpose of an organization is not social, the existence of social features which are an essential and material part of the organization's functions and not merely incidental makes it a social club within the meaning of the Revenue Acts. See Treasury Regulations 43 (Revised, June, 1932), Article 36 (Appendix, *infra*); *Army and Navy Club of America* v. *United States,* 53 F. (2d) 277 (C. Cls.), certiorari denied, 285 U. S. 548; *Union League Club of Chicago* v. *United States,* 4 F. Supp. 929 (C. Cls.); *The Lambs* v. *United States,* 8 F. Supp. 737 (C. Cls.), certiorari denied, 297 U. S. 713; *Duquesne Club* v. *United States,* 23 F. Supp. 781 (C. Cls.), certiorari denied, 306 U. S. 649; and *Duquesne Club* v. *Bell* (C. C. A. 3d), decided April 13, 1942, not yet officially reported, but found in 1942 Prentice Hall, Vol. 4, ¶ 62,642.

The earlier decisions of the court below which are relied on (Pet. 4–5)[1] do not establish a conflict which needs to be resolved by this Court. *Tidwell* v. *Anderson,* 72 F. (2d) 684 (C. C. A. 2d), does

[1] *Cosmos Club* v. *United States*, 42 F. (2d) 321 (C. Cls.); *Bankers' Club of America* v. *United States*, 37 F. (2d) 982 (C. Cls.); *Builders' Club of Chicago* v. *United States*, 58 F. (2d) 503 (C. Cls.); *Chemists' Club* v. *United States*, 64 C. Cls. 156.

not present any conflict with respect to the test of taxability to be applied (cf. p. 687). Every case in this field turns upon analysis of the activities of the particular organization involved.

2. The contention that the prior decisions of the District Court are *res judicata* is without merit, since the instant suit arises upon a different set of facts than was involved in the suits in the District court.[2]

Tait v. *Western Md. Ry. Co.*, 289 U. S. 620, did not present a similar situation. There the events sought to be tried in the second suit were the identical historical events which had been tried earlier. Cf. *Federal Trade Commission* v. *Raladam Co.*, No. 826, present Term, decided April 27, 1942.

3. In the event certiorari is granted, we intend to press the defense made in the court below that the petitioner cannot recover in any event since it failed to comply with the requirements of Article 54 of Treasury Regulations 43 (Revised, June, 1932), in that it did not furnish powers of attorney from the various members of the club who, through the club, paid the taxes which were sought to be recovered in the refund claim. This was urged by us below as the primary question

[2] Aside from this, the judgment in the suit against the Collector is not *res judicata* since the Collector and the United States may not be regarded as the same parties under the recent decision of this Court in *United States* v. *Nunnally Investment Co.*, No. 990, October Term, 1940.

and, while the majority opinion did not discuss it, the concurring opinion below was rested upon this ground. We think that that opinion is sound, in which event the questions presented by the petitioner are moot.

CONCLUSION

The decision of the court below is correct. There is no conflict of decision shown and the petition should be denied.

Respectfully submitted,

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MAY, 1942.